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IN THE

Supreme Court of the United States

October Term, 1970

No. 231

COUNTY OF ORANGE, a political subdivision of the State of California and City of Buena Park,

Petitioners,

vs.

STERLING LIQUOR DISTRIBUTORS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, State of California, Fourth Appellate District, Division One.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

LATHAM & WATKINS,
RICHARD F. ALDEN,
DONALD PATRICK NEWELL,
615 South Flower Street,
Los Angeles, Calif. 90017,
Attorneys for Respondent Sterling Liquor Distributors, Inc.

Parker & Son, Inc., Law Printers, Los Angeles, Phone 685-9790

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IN THE

Supreme Court of the United States

October Term, 1969
No. 1663

COUNTY OF ORANGE, a political subdivision of the State of California and City of Buena Park,
Petitioners,

vs.

STERLING LIQUOR DISTRIBUTORS, INC.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, State of California, Fourth Appellate District, Division One.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

I.
Jurisdiction.

The jurisdiction of this court is sustained under 28 U.S.C. Section 1257(3) since the actions taken by Petitioner were invalidated below on the grounds that they infringed upon a privilege and immunity granted Respondent by the Constitution of the United States.

II.
Opinions Below.

The superior court entered judgment for Respondent (see Appendix A to Petitioners' Brief), which was affirmed by the court of appeal (see Appendix B to Petitioners' Brief). There was no opinion by the Supreme Court of the State of California which declined to review the decision of the court of appeal. A copy

of the California Supreme Court's order, dated March 11, 1970, is appended to Petitioners' Brief as Appendix C.

III.

Constitutional Provision Involved.

United States Constitution, article I, section 10, Clause 2.

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . ."

IV.

Question Presented.

Whether article I, section 10, clause 2 of the United States Constitution precludes the levy of ad valorem property tax on goods imported for resale while such goods are held by the importer in their original package.

V.

Statement of the Case.

The facts of this case are concisely stated in the opinion of the court of appeal (see Petitioners' Brief, Appendix B). Respondent is an importer of liquor. The imported liquors in question were kept in Respondent's warehouse in their original unopened packages and held for sale to retailers. Petitioners assessed ad valorem property taxes on the unopened cases for the years 1966-1967 and 1967-1968. Respondent paid such taxes and filed suit for refund. The trial court entered judgment for Respondent, which judgment was affirmed by the court of appeal. The Superior Court of the State of California declined to review the decision.

ARGUMENT.

There Is No Substantial Federal Question.

The court below has decided this case in accord with the applicable decisions of this Court. *Anglo-Chilean Nitrate Sales Corp. v. Alabama,* 288 U.S. 218 (1933), *Low v. Austin,* 80 U.S. (13 Wall.) 29 (1871), *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419 (1827). *See Youngstown Sheet and Tube Company v. Bowers,* 358 U.S. 534 (1959) and *Department of Revenue v. James Beam Distilling Company,* 377 U.S. 341 (1969). The state court cases likewise have uniformly supported the position of the California court. *See, e.g., Tricon, Inc. v. King County,* 60 Wash. 2d 392, 374 P.2d 174 (1962), *cert. denied,* 374 U.S. 277 (1963); *H. A. Morton Company v. Board of Revenue, City of Milwaukee,* 15 Wis. 2d 330, 112 N.W.2d 914 (1962), *Miehle Printing Press v. Department of Revenue,* 18 Ill. 2d 445, 164 N.E.2d 1 (1960); *Emhart Corporation v. Town of West Hartford,* 28 Conn. Sup. 134, 253 A.2d 670 (Ct. C.P. 1968). The Court is simply being asked by Petitioner to review a question it has considered and consistently determined on several past occasions.

In *Brown v. Maryland,* this Court construed the Constitution's Import Clause for the first time. The Court held that goods imported for sale are exempt from State taxation while held by the importer in their "original package." The facts in this case are not in dispute. The goods in question in the instant case were at all times held for sale by Respondents in their original packages.

The specific question now before the Court was decided in *Low v. Austin, supra.* The facts in *Low v.*

Austin are identical to the facts in the instant case; the tax is the very tax sought to be imposed here by Petitioners. In *Low* the plaintiffs were importers of wine and commission merchants in San Francisco. They had received a shipment of imported wines which they held in their warehouse, in the original cases, awaiting sale. The City and County of San Francisco imposed an ad valorem property tax upon the wines. This Court, reversing the California Supreme Court, held the imported wines non-taxable. There, as here, the position of the taxing authority was based on the non-discriminatory nature of an ad valorem property tax. In response to this contention the Court held as follows:

> The obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or have been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any tax." 80 U.S. (13 Wall.) 34-35.

It is not surprising that the California Supreme Court declined to review the instant case inasmuch as the lower court correctly followed the holding of this Court in *Low*.

In *Youngstown Sheet and Tube Company v. Bowers*, 358 U.S. 538 (1959), this Court held that goods imported by a manufacturer lose their distinctive character as imports when they are used to supply the day-to-day manufacturing requirements of the manufacturer-importer, although they have not been removed from their original packages, 358 U.S. 548-549.

The *Youngstown* case held only that such manufacturing goods have been "put to the use for which they [were] imported," and therefore are taxable regardless of the fact that they remain in their original packages. 358 U.S. 548. The Court explicitly recognized the important dichotomy between goods imported for sale and goods incorporated into a day-to-day manufacturing inventory. 358 U.S. 548-549. The former are obviously not "put to the use for which they were imported" until they are sold.

Petitioners rely on a phrase from Justice Frankfurter's dissent in *Youngstown Sheet and Tube Company v. Bowers* for the proposition that *Youngstown* is a "reversal of all previous judicial decision on the Import Clause" (358 U.S. at 750, Petitioners' Brief at 10). There are several reasons why Petitioners' position is untenable.

First, the majority in *Youngstown* expressly refrained from overruling any prior decision. They note at the outset that one may read *Brown v. Maryland* as stating that goods imported for use by the importer have no exemption. The majority followed *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (the only other Supreme Court decision dealing with goods imported for use in manufacturing) in deciding that materials imported for use by the importer are exempted

from taxation by the states until "put to use." However, the *Youngstown* majority decided that manufacturers have put their goods to use when such goods are placed in inventory to supply current manufacturing needs and thus are irrevocably committed to use in manufacture. *Youngstown*, far from overruling *Brown v. Maryland*, builds upon Justice Marshall's holding, amplifying and explaining its application to goods imported for use in manufacturing without disturbing its application to goods imported for sale.

Secondly, both *Brown v. Maryland* and *Low v. Austin* have been cited and followed numerous times since the *Youngstown* case. For example, in *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964), the State of Kentucky had imposed a tax of 10 cents per gallon on liquor shipped into the state. The tax was collected while the whiskey remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer. The Court held that the tax was barred by the Import Clause, citing *Brown v. Maryland* and quoting the following from *Low v. Austin:*

> "The goods imported do not lose their character as imports, . . . until they have passed from the control of the importer or have been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any share, is within the constitutional prohibition." (377 U.S. at 384).

The Court's reliance on *Low* in the *James Beam* case does not support petitioner's contention that *Youngstown* overruled *Low*.

Moreover, in the years since *Youngstown*, this Court has also twice denied *certiorari* in cases involving

attempts by taxing authorities to levy ad valorem taxes against imported goods held in their original packages for resale. *City of Detroit v. Kenwall Products Corp.*, 14 Mich. App. 657, 165 N.W.2d 875, *cert. denied*, 90 S.Ct. 87 (1969). *Tricon, Inc. v. King County*, 60 Wash. 2d 392, 374 P.2d 174 (1962), *cert. denied*, 374 U.S. 227 (1963).

The decision in *Virtue Bros. v. County of Los Angeles*, 239 Cal. App. 2d 220, 48 Cal. Rptr. 505 (1966), cited profusely by Petitioners, provides no support for Petitioners' position. The California Court of Appeal succinctly stated:

> "*Youngstown* does not permit the type of state tax here levied on materials imported for sale. *Youngstown* affirms that materials held for sale are still immune." (239 Cal. App. 2d at 223).

Conclusion.

The authorities are uniform: Goods imported for sale and held in their original unopened packages remain "imports" and are not subject to state taxation of any kind, whether discriminatory or non-discriminatory. Petitioners in essence are requesting this Court to review the identical question settled by this Court in *Low v. Austin* and consistently followed on numerous occasions. For the reasons and on the basis of the authorities set forth in this brief, Respondent respectfully submits that Petitioners' Petition for Writ of Certiorari should be denied.

Dated: Los Angeles, California, on July 8, 1970.

Respectfully submitted,

RICHARD F. ALDEN,
DONALD PATRICK NEWELL,
LATHAM & WATKINS,
Attorneys for Respondent.